DAYATERA ROOF SYSTEMS SDN BHD v. SENI TELITI SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[COMPANIES (WINDING-UP) NO: 28NCC-683-09-2014]
16 JANUARY 2015

COMPANY LAW: *Winding up – Liquidation – Appointment of provisional liquidator – Whether s. 227(1) of Companies Act 1965 (CA) had mandatory legal effect – Whether official receiver required to be first appointed as provisional liquidator when no liquidator proposed – Whether s. 227(1) of CA should be given purposive interpretation – Whether non-compliance curable under s. 221(2)(b) of CA and/or r. 194(1) of the Companies (Winding Up) Rules 1972*

COMPANY LAW: *Winding up – Procedure – Summons in chambers filed pending winding up proceedings – Whether may be heard ex parte – Whether falls under exception to r. 7(2) of Companies (Winding Up) Rules 1972 – Whether secrecy necessary – Whether respondent deprived of right to be heard*

The petitioner had been wound up by the Kuala Lumpur High Court in 2009 where the court appointed one Wong Soon Fong as liquidator for the petitioner. In 2013, the petitioner had obtained a judgment against the respondent company wherein the respondent company was ordered to pay a sum of money. The respondent company failed to pay the sum despite being served with a demand under s. 218(2)(a) of the Companies Act 1965 ('CA') by the petitioner. Hence, this petition. The petitioner then filed an *ex parte* summons in chambers in court encl. 6 ('SIC') to apply for leave to advertise the petition in the government gazette and once in any two different local newspapers to sufficiently comply with r. 24 of the Companies (Winding Up) Rules 1972 ('WUR'). At the hearing of the SIC, however the court inquired whether the petitioner could proceed with the SIC on an *ex parte* basis and the hearing was adjourned to allow the petitioner to submit on the same. After hearing the petitioner's submissions, the court decided for the SIC to be heard *inter partes* and for the SIC to be served on the respondent. Despite having been served with the SIC, the respondent was not present on the date of the *inter partes* hearing and the court allowed the SIC. The petitioner then applied for the respondent to be wound up and for the official receiver ('OR') to be appointed as the provisional liquidator ('PL') under s. 227(1) of the CA as it was submitted by the petitioner that the section mandatorily required the appointment of the OR as the PL. The court did not accept the petitioner's contention and proceeded to wind up the respondent but appointed the OR as the liquidator and not the PL for the respondent. Dissatisfied, the petitioner applied by way of a letter for the High Court Judge to reconsider its decision and since the order has not been sealed and extracted, the winding up court was not *functus officio* to reconsider. The court set another date for hearing of the petitioner's further submissions. In

the two material hearings, the court had considered two main issues, *ie*, (i) whether a summons in chambers filed in a pending winding up petition may be heard *ex parte* under the WUR; and (ii) whether s. 227(1) of the CA mandatorily required the OR to be first appointed as a PL of the company when no private liquidator was proposed to be appointed as the company's liquidator or could the winding up court immediately appoint the OR as the liquidator.

Held (dismissing petitioner's application in encl. 6):

(1) As a matter of general rule, SIC should be heard *inter partes* and not on an *ex parte* basis. Rule 7(2) of the WUR provided for an exception namely when the winding-up court ordered the SIC to be heard *ex parte*. Another exception was when "it is genuinely impossible to give notice without defeating the purpose of the order" or where there was a need for secrecy. Unless secrecy was required, the party against whom an order was sought should be given a right to be heard. The need for urgency should be distinguished from the requirement of secrecy. (para 18)

(2) Order 32 r. 6 of the Rules of Court 2012 ('ROC') conferred power on the winding up court to set aside an *ex parte* order. As the WUR was silent on whether the winding-up court may set aside an *ex parte* order, O. 1 r. 2(1)(a) read with O. 32 r. 6 of the ROC would apply. If the winding up court had no power to set aside an *ex parte* order, this might cause injustice to the respondent company who had been deprived of the right to be heard and had to wait until the hearing of the winding-up petition to set aside the *ex parte* order. An SIC should be heard *inter partes* to avoid more litigation in the form of applications to set aside *ex parte* orders. (para 18)

(3) *Ex parte* applications to appoint PL under s. 231 of the CA and r. 35(1) of the WUR so as to prevent dissipation of the respondent company's assets may be made *ex parte* where secrecy was essential. Nevertheless, it may still be made on an *inter partes* basis if there was no need for secrecy. (para 19)

(4) The court was unable to see how the winding-up court might rely on its own inherent jurisdiction to hear an *ex parte* SIC when the *ex parte* hearing itself might constitute an abuse of court process. The case of *Fairview Schools Bhd v. Indrani Rajaratnam & Ors (No 1)* did not support the petitioner's contention that an SIC might be heard on an *ex parte* basis. (para 22)

(5) A sealed order was not a *ratio decidendi* which forms a binding precedent and therefore the host of sealed *ex parte* orders of the High Court cited by the petitioner on a variety of matters pertaining to winding-up could not be accepted as a basis to justify an *ex parte* hearing of the SIC. (paras 28 & 29)

(6) The cases referred to by the petitioner did not discuss s. 227 of the CA and did not decide on the effect of the section, let alone the mandatory effect of sub-s. (1) in appointing the OR as PL as claimed by the petitioner. There was also no need for the OR to be appointed as PL mandatorily under s. 227(1) as the petitioner might apply to appoint a PL as expressly stated under s. 231 of the CA and r. 35(1) of the WUR. In any event, the High Court was not bound by a previous High Court's judgment. There were no Malaysian cases which had decided on s. 227 of the CA nor any judgments from Singapore, Australia, New Zealand and England which referred to a provision similar to our s. 227 of the CA. (paras 32, 33 & 36)

(7) Section 227(1) of the CA should be given a purposive interpretation. The primary object of winding up was the collection and distribution of the respondent company's assets *pari passu* among the respondent company's unsecured creditors and the process should be completed speedily and in a less costly manner. The OR had very limited resources and the petitioner's construction of the section would unnecessarily increase the OR's already heavy workload. (paras 39-40)

(8) In the event the court had erred in interpreting s. 227(1) of the CA, assuming that the section did have mandatory legal effect, the non-compliance of the section was curable under s. 221(2)(b) of the CA and/or r. 194(1) of the WUR. (para 41)

Case(s) referred to:

Ameriasa Tours & Travel Sdn Bhd v. PJB Pacific Advisory Services Sdn Bhd [2004] 2 CLJ 586 HC ***(refd)***

Bidari Ehsan Sdn Bhd (In Liquidation) v. Inai Tropika Sdn Bhd [2012] 1 LNS 842 HC ***(dist)***

Chin Wai Hong & Anor v Lim Guan Hoe & Anor [2014] 1 LNS 859 HC ***(refd)***

Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 HC ***(refd)***

Fairview Schools Bhd v. Indrani a/p Rajaratnam & Ors [1998] 1 CLJ 285 CA ***(dist)***

GKM Amal Sdn Bhd v. Bank Utama (M) Bhd [2004] 1 CLJ 769 CA ***(refd)***

Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***

Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189 HC ***(refd)***

Lim Yong Chiang v. Suria 2000 Sdn Bhd [2014] 1 LNS 884 HC ***(dist)***

Ling Nam Rubber Works v. Leong Bee & Company (No 2) [1968] 1 LNS 72 HC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen [2009] 6 CLJ 405 FC ***(refd)***

Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 SC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC ***(refd)***

Maril-Rionebel (M) Sdn Bhd v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(dist)***

National Commercial Bank Jamaica Ltd v. Olint Corporation Ltd [2009] 1 WLR 1405 ***(refd)***

A *Pac Asian Services Pte Ltd v. European Asian Bank AG [1989] 3 MLJ 385* ***(refd)***
Pacific Centre Sdn Bhd lwn. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal [2004] 2 CLJ 265 HC ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
B *Pui Chiau Tien v. Foi Chaw Leong & Anor [2004] 5 CLJ 145 HC* ***(refd)***
Re Lo Siong Fong [1994] 1 LNS 188 HC ***(refd)***
Sigma Elevator (M) Sdn Bhd v. Bahagia Indah Properties Sdn Bhd [2014] 1 LNS 779 HC ***(refd)***
South Downs Packers Pty Ltd v. Beaver (1983-1984) 8 ACLR 990 ***(refd)***
C *Sundralingam v. Ramanathan Chettiar [1967] 1 LNS 173 FC* ***(refd)***
Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
Wiraflor (Malaysia) Sdn Bhd v. Bio Science Capital Sdn Bhd [2011] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
D Companies Act 1965, ss. 4(1), 218(2)(a), (f), 221(2)(b), 226(3), 227(1), (2), 231, 232(1)
Companies (Winding Up) Rules 1972, rr. 3(1), 7(1), (2), 24, 35(1), 101(1), 193, 194(1)
Criminal Procedure Code, s. 158(2)
Interpretation Acts 1948 and 1967, ss. 2(1)(b), (e), 15, 17A
E Rules of Court 2012, O. 1 rr. 2(1)(a), 2(2), O. 3 r. 5(1), O. 32 r. 6, O. 92 r. 4

Other source(s) referred to:
Atkin's Encyclopaedia of Courts Forms, 2nd edn, 1981 Issue, p 84
Halsbury's Statutes of England, 2nd edn 1949, para 238, p 652

F *For the petitioner - Alex Chang Huey Wah (Lim Soo Zee with him); M/s Alex Chang & Co*
For the respondent - Not represented

Reported by Lyana Shohaimay

G **JUDGMENT**

Wong Kian Kheong JC:

Introduction

[1] This case discusses whether a summons in chambers filed in a pending
H winding up petition, may be heard *ex parte* under the Companies (Winding Up) Rules 1972 ('WUR').

[2] The second question which arises in this winding up petition (this petition) is when the court pronounces the winding up of a company:

I (a) whether s. 227(1) of the Companies Act 1965 ('CA') mandatorily requires the Official Receiver ('OR') to be first appointed as a provisional liquidator of the company ('PL') when no "private

liquidator" (an "approved liquidator" (defined in s. 4(1) CA) who is not the OR) is proposed to be appointed as the company's liquidator ('liquidator'); or

(b) can the winding up court immediately appoint the OR as the liquidator.

Background

[3] The petitioner company ('petitioner') has been earlier wound up by the Kuala Lumpur High Court ('KLHC') on 23 June 2009 in Kuala Lumpur High Court Companies (Winding-up) No. D6-28-508-2008. The KLHC has appointed one Mr Wong Soon Fong as the liquidator for the petitioner.

[4] On 30 January 2013, the petitioner has obtained a judgment in Kuala Lumpur High Court Suit No. 22 NCC-1198-07/2012 against the respondent company ('respondent') wherein the respondent was ordered to pay, among others, a principal sum of RM204,353.97 as at 29 February 2012 with interest ('judgment sum').

[5] The petitioner's solicitors served a demand under s. 218(2)(a) CA on the respondent on 4 June 2014 to pay the judgment sum ('statutory demand') within three weeks from the date of service of the statutory demand.

[6] The respondent failed to comply with the statutory demand and consequently, this petition was filed on 15 September 2014.

[7] On 15 October 2014, the petitioner filed an *ex parte* summons in chamber in court enclosure no. 6 ('SIC') to apply for essentially the following two orders:

(a) leave of the winding up court be granted for the petitioner to advertise this petition in the "Gazette" (defined as the Malaysian Government Gazette in r. 2(1) WUR); and

(b) the requirement for a double advertisements in any one newspaper be dispensed with and r. 24 WUR shall be deemed to be sufficiently complied with by advertising once each, at least, in two different local newspapers circulating in Malaysia.

[8] When the *ex parte* SIC was first heard on 21 October 2014, I inquired whether the petitioner could proceed with the SIC on an *ex parte* basis under the WUR. The petitioner's learned counsel, Mr Alex Chang Huey Wah, orally applied for an adjournment of the hearing of the SIC so that he could prepare a written submission on whether the winding up court can hear the SIC on an *ex parte* basis under the WUR. I then adjourned the hearing of the *ex parte* SIC to 30 October 2014.

[9] On 30 October 2014, Mr Alex Chang presented both written and oral submission to persuade me that the SIC could be heard *ex parte*. Regrettably, for reasons which I would give later in this judgment, I was of the view that

A the SIC should be heard *inter partes* and directed the SIC to be served on the respondent ('first decision'). The petitioner has appealed to the Court of Appeal against the first decision.

[10] When the SIC was heard *inter partes* on 10 November 2014:

B (a) the respondent was not present despite the petitioner's service of the cause papers regarding the SIC on the respondent; and

(b) this court allowed the SIC.

[11] When this petition was heard on 17 November 2014, the respondent was again not present (despite the petitioner's service of the petition on the C respondent). The petitioner applied for, among others, the respondent to be wound up and for the OR to be appointed as the PL under s. 227(1) CA. I queried the petitioner's learned counsel then, Ms Lim Soo Zee, on why the winding up court should not immediately appoint the OR as the liquidator upon the winding up of the respondent. Ms Lim answered that s. 227(1) CA D mandatorily required the appointment of the OR as the PL. With respect, I did not accept this contention and I wound up the respondent and appointed the OR as the liquidator ('second decision'). The respondent filed a second appeal to the Court of Appeal against part of the second decision wherein I have appointed the OR as the liquidator (not as PL).

E **[12]** Despite the second decision, the petitioner's learned solicitors applied by way of a letter for me to reconsider the second decision. As the order for the second decision has not been sealed and extracted, the winding up court is not *functus officio* and may re-consider the second order. This is clear from the Federal Court's judgment in *Ling Nam Rubber Works v. Leong Bee & Co* F *(No 2)* [1968] 1 LNS 72; [1968] 1 MLJ 265, at p. 266. I then direct my learned Senior Assistant Registrar to fix a date for me to hear further submission by the petitioner's learned counsel.

[13] On 3 December 2014, Mr Alex Chang submitted orally, among others, that upon the pronouncement of a winding up order, s. 227(1) CA G mandatorily requires the OR to be first appointed as PL. Once again, for reasons stated later in this judgment, with regrets, I am unable to accede to the petitioner's application for me to re-visit the second decision.

When A SIC Can Be Heard *Ex Parte* Under WUR?

H *Petitioner's Submission*

[14] Mr Alex Chang submitted that the SIC may be heard *ex parte* for the following reasons:

(a) the WUR do not "prohibit" an *ex parte* hearing of the SIC;

I (b) applications to appoint PL have been made *ex parte* in accordance with the following cases and reference books:

(i) the High Court case of *Emporium Jaya (Bentong) Sdn Bhd (In Liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10;

(ii) the High Court's judgment in *Pui Chiau Tien v. Foi Chaw Leong & Anor* [2004] 5 CLJ 145;

(iii) the decision of the Singapore Court of Appeal in *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385;

(iv) the judgment of the full court of the Supreme Court of Queensland in *South Downs Packers Pty Ltd v. Beaver* (1983-1984) 8 ACLR 990;

(v) "*Atkin's Encyclopaedia of Courts Forms*", 2nd edn. (1981 Issue), at p. 84; and

(vi) *"Halsbury's Statutes of England"*, 2nd edn. (1949), para. 238, at p. 652;

(c) the winding up court has the power under s. 221(2)(b) and (f) CA to dispense with any step which is required by CA and WUR and to give any direction as the court thinks fit;

(d) the court has inherent jurisdiction under O. 92 r. 4 of the Rules of Court 2012 ('RC') to hear a matter on an *ex parte* basis. The Court of Appeal's judgment in *Fairview Schools Bhd v. Indrani a/p Rajaratnam & Ors* [1998] 1 CLJ 285; [1998] 1 MLJ 99 has been relied on by the petitioner in support of the winding up court's inherent jurisdiction to hear the SIC on an *ex parte* basis; and

(e) sealed *ex parte* orders of other High Courts sitting as winding up courts on a variety of matters pertaining to winding up, have been submitted to this court in support of the petitioner's contention.

SIC Should Be Heard Inter Partes

[15] Rule 7 WUR provides as follows:

> 7.(1) Every application in Court, other than a petition, shall be made by motion and shall be served on the party effected thereby not less than two days before the day named in the notice for hearing of the motion. **An application for leave to serve short notice of motion shall be made *ex parte*.**
>
> 7(2) *Every application in Chambers shall be made by summons in Form 1, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require that person or persons to whom the summons is addressed to attend at the time and place named in the summons; and the summons shall be served not less than two days before the day named in the summons, unless in any case it shall be otherwise ordered.* (emphasis added)

[16] Rule 7(1) WUR provides that an application for short service of a notice of motion "shall" be made *ex parte*. Rule 7(1) WUR concerns motions and not SIC's.

[17] I am of the view that as a matter of general rule, SIC's should be heard *inter partes* and not on an *ex parte* basis ('general rule'). The general rule is premised on the following reasons:

(a) the opening words in r. 7(2) WUR have expressly stated that the SIC "shall be served on every person against whom an order is sought, and shall require that person or persons to whom the summons is addressed to attend at the time and place named in the summons". Rule 7(2) WUR itself provides for an exception to the general rule, namely when the winding up court orders the SIC to be heard *ex parte* ('first exception'); and

(b) Form 1 in the First Schedule to the WUR ('Form 1') is expressly provided by r. 7(2) WUR to be used as the SIC. Rule 3(1) WUR also provides for the application of Form 1. Form 1 states as follows:

> … Note – *If you do not attend, either in person or by your solicitor, at the time and place above-mentioned, such order will be made, and proceedings taken, as the Judge (or Registrar) may think just and expedient*.

(emphasis added)

The above contents of Form 1 support the General Rule. It is to be noted that CA has been revised under the Revision of Laws Act 1968 ('RLA'). Accordingly, Part 1 of the Interpretation Acts 1948 and 1967 ('IA') applies to WUR by virtue of s. 2(1)(e) IA (subsidiary legislation made after 31 December 1968, under the laws revised under the Revision of Laws Act 1968).

Section 15 IA provides as follows:

> *… every schedule (together with any note or table annexed to the schedules) … to any subsidiary legislation shall be construed and have effect as part of the … subsidiary legislation*.

(emphasis added)

Based on s. 15 IA, Form 1 "shall be construed and have effect as part" of WUR.

[18] The general rule is supported by the following considerations:

(a) an application to court should only be made *ex parte* when "it is genuinely impossible to give notice without defeating the purpose of the order". In other words, an application should be made *ex parte* when there is a need for secrecy, such as an application for Anton Piller and

Mareva order. This, in my view, constitutes a second exception wherein a SIC may be filed *ex parte* ('second exception'). The following cases are relevant:

(i) in *National Commercial Bank Jamaica Ltd v. Olint Corporation Ltd* [2009] 1 WLR 1405, at pp. 1409-1410, an appeal to the Privy Council from Jamaica, Lord Hoffmann gave the following opinion:

> … there appears to have been no reason why the application for an injunction should have been made *ex parte*, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alteram partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application for which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. … Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant **should not have given shorter notice or even made a telephone call. Any notice is better than none**. (emphasis added);

(ii) the judgment of Edgar Joseph Jr J (as His Lordship then was) in the High Court case of *Pacific Centre Sdn Bhd lwn. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ 319; [1984] 2 MLJ 143, at p. 146;

(iii) *Chin Wai Hong & Anor v. Lim Guan Hoe & Anor* [2014] 5 AMR 427, at pp. 449-452, [2014] 1 LNS 859; and

(iv) *Sigma Elevator (M) Sdn Bhd v. Bahagia Indah Properties Sdn Bhd* [2014] AMEJ 872, [2014] 1 LNS 779, at paras. 16-20;

(b) if a SIC is heard on an *inter partes* basis, there is less likelihood of abuse of court process. *Ex parte* procedure is more likely to be abused than when a matter is heard *inter partes* in the presence of an opposing party;

(c) unless secrecy is required, the party against whom an order is sought, should be given a right to be heard, in accordance with the second rule of natural justice – *National Commercial Bank Jamaica Ltd;*

(d) the need for urgency should be distinguished from the requirement of secrecy. If there is an urgent reason to hear an application immediately but there is no need for secrecy, such an application should still be heard *inter partes* on an urgent basis whereby the solicitor for the applicant may:

(i) file a certificate of urgency as provided in Practice Note No. 3/1985;

(ii) apply to the winding up court to abridge time under r. 193 WUR (a similar provision for abridgement of time is provided in O. 3 r. 5(1) RC) to have short service of the urgent SIC in question; and

(iii) when the court fixes an early date to hear the *inter partes* application (presumably on a certificate of urgency filed by the applicant's solicitor), the applicant may apply for an *ad interim* order in the respondent's presence – please see *Chin Wai Hong*, at pp. 449-450, and *Sigma Elevator (M) Sdn Bhd*, at para. 16; and

(e) Order 32 r. 6 RC confers power on a court to set aside an *ex parte* order – please see the Federal Court's judgment in *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458, at p. 463. WUR however do not provide for the winding up court's power to set aside an *ex parte* order. I am of the opinion that O. 32 r. 6 RC confers power on a winding up court to set aside an *ex parte* order. I am of such a view for the following reasons:

(i) Order 1 r. 2(1)(a) RC provides that subject to O. 1 r. 2(2) RC, RC apply to the High Court, including the winding up court. Order 1 r. 2(2) prohibits the application of RC if "rules have been … made under any written law for the specific purpose of such proceedings". As WUR are silent on whether the winding up court may set aside an *ex parte* order, O. 1 r. 2(1)(a) read with O. 32 r. 6 RC will apply to confer power on the winding up court to set aside an *ex parte* order; and

(ii) if the winding up court has no power to set aside an *ex parte* order, this may cause injustice to the respondent company who has been deprived of its right to be heard in accordance with the second rule of natural justice before the *ex parte* order is granted and the respondent company has to wait until the hearing of the winding up petition to set aside the *ex parte* order.

If the winding up court has the power to set aside an *ex parte* order and if SIC's may be heard on an *ex parte* basis, this means it will be likely that there will be more applications to set aside *ex parte* orders. This will inevitably increase litigation with its attendant costs, time and effort. Accordingly, if the general rule is upheld, namely a SIC should be heard *inter partes*, this will avoid more litigation in the form of applications to set aside *ex parte* orders.

[19] In my view, *ex parte* applications to appoint PL under s. 231 CA and r. 35(1) WUR so as to prevent dissipation of the respondent company's assets, fall within the second exception. Such applications may be made *ex parte* as secrecy is essential to prevent dissipation of the assets of the

respondent company. The following cases have held that pending the disposal of a winding up petition, a petitioner may apply to appoint a PL to prevent dissipation of the respondent company's assets to the detriment of the respondent company's creditors:

(a) VC George J's (as His Lordship then was) judgment in the High Court case of *Re Lo Siong Fong* [1994] 1 LNS 188; [1994] 2 MLJ 72, at p. 82;

(b) the judgment of Ramly Ali J (as His Lordship then was) in the High Court in *Emporium Jaya (Bentong) Sdn Bhd*, at p. 30;

(c) the High Court's decision by Abdul Malik Ishak J (as His Lordship then was) in *Ameriasa Tours & Travel Sdn Bhd v. PJB Pacific Advisory Services Sdn Bhd* [2004] 2 CLJ 586, at p. 590;

(d) Varghese George JC's (as His Lordship then was) judgment in the High Court case of *Wiraflor (Malaysia) Sdn Bhd v. Bio Science Capital Sdn Bhd* [2011] 4 CLJ 441; [2011] 2 MLJ 94, at pp. 103, 115 and 116; and

(e) the Singapore Court of Appeal's judgment in *Pac Asian Services Pty Ltd*, at pp. 391-392.

Despite the above, an application to appoint a PL may still be made on an *inter partes* basis if there is no need for secrecy – *Ameriasa Tours & Travel Sdn Bhd* and *Wiraflor (M) Sdn Bhd. Ex parte* applications to appoint PL have been made in *Emporium Jaya (Bentong) Sdn Bhd, Pui Chiau Tien* and *Pac Asian Services Pty Ltd.*

No Resort To Court's Inherent Jurisdiction

[20] In view of the express provision of r. 7(2) WUR and Form 1, no resort should be made to the court's inherent jurisdiction. Suffice for me to rely on the following two judgments of our apex court:

(a) the Supreme Court's judgment in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 2 MLJ 178, at p. 181; and

(b) the Federal Court case of *Majlis Agama Islam Selangor v. Bong Boon Chuen* [2009] 6 CLJ 405; [2009] 6 MLJ 307, at p. 320.

[21] As explained above, if a SIC is heard *ex parte*, there is a likelihood of abuse of court process in the form of abuse of the *ex parte* procedure. Accordingly, I am unable to see how the winding up court may rely on its own inherent jurisdiction to hear an *ex parte* SIC when the *ex parte* hearing itself may constitute an abuse of court process.

[22] The Court of Appeal's judgment in *Fairview Schools Bhd*, at pp. 105-107, concerned the right of the respondent company's contributories and creditors to intervene in a winding up petition ('intervention application').

In *Fairview Schools Bhd*, the intervention application was heard *inter partes*. I am of the view that *Fairview Schools Bhd* does not support the petitioner's contention that a SIC may be heard on an *ex parte* basis.

Can s. 221(2)(b) And (f) CA "Justify" Ex parte Hearing Of SIC?

[23] Section 221(2) CA reads as follows:

> 221.(2) **The Court may** on the petition coming on for hearing or at any time **on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:**
>
> …
>
> (b) **dispense with any notices being given or steps being taken which are required by (CA) or by the (WUR)**, or by any prior order of the Court;
>
> …
>
> (f) **give such directions as to the proceedings as the Court thinks fit**. (emphasis added)

[24] I shall also refer to r. 194(1) WUR which provides as follows:

> 194.(1) *No proceeding under (CA) or the (WUR) shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court*. (emphasis added)

[25] I am of the view that s. 221(2)(b) and (f) CA as well as r. 194(1) WUR cannot be used to "justify" an *ex parte* hearing of a SIC. My view is based on the following reasons:

(a) unless there is a need for secrecy, the second rule of natural justice should be adhered to. If otherwise, there will be a substantial injustice to the respondent which will negative the application of s. 221(b) and (f) CA as well as r. 194(1) WUR; and

(b) there is no Malaysian case which has relied on s. 221(b) and (f) CA as well as r. 194(1) WUR to justify an *ex parte* hearing of a SIC. I am also not aware of any case in Singapore, Australia, New Zealand and England (countries with similar companies legislation) which have relied on statutory provisions similar to s. 221(b) and (f) CA as well as r. 194(1) WUR, to conduct the hearing of a SIC on an *ex parte* basis.

[26] The petitioner has relied on the Supreme Court's judgment in *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446. In *Mosbert Bhd (In Liquidation),* at p. 447:

(a) the respondent applied to the winding up court on an *ex parte* basis for leave under s. 226(3) CA to commence suit against the wound up appellant company;

(b) the winding up court granted *ex parte* leave;

(c) the appellant company subsequently applied to set aside the *ex parte* leave but the winding up court affirmed the *ex parte* leave; and

(d) on appeal, the Supreme Court held as follows:

> *The question therefore arises whether "leave of the Court" should be obtained by way of (a) an ex parte summons-in-chambers or (b) inter partes summons. In re Western & Brazilian Telegraph Co v. Bibby (1880) 42 LT 821 Jessel M.R. was reported to have said that leave to commence an action against a company in liquidation should not be given on an ex parte application. No reason was given by the learned Master of the Rolls. But in our opinion, this practice of the Court should be adopted and followed for these reasons, viz., it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company pari passu amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company. It is for this reason that application under section 226(3) of the Companies Act 1965 should be made inter partes so that the summons could be served on the [OR] who should be heard before the discretion of the Court is exercised. Without hearing the [OR] the Court cannot be said to have exercised the discretion judicially.*
>
> *Although we agree with the submission of learned counsel for the appellant that leave under section 226(3) should not be given on an ex parte application we are constrained to point out that on a subsequent summons taken out by the appellant to set aside the Court order, the [OR] was represented by learned counsel at the hearing and addressed the Court on the merits of the application. On perusing the record of appeal we are satisfied that the learned judge was right to re-affirm his decision to grant leave after the views of the [OR] had been heard and considered. Notwithstanding that the giving of leave to commence legal proceedings against the appellant on the ex parte application of the respondent constituted an irregularity we are further satisfied that no substantial injustice had been caused to the appellant in any way* [see section 355(1) of the Act], and we find that there is no merit in this ground of appeal. (emphasis added)

[27] I am of the view that *Mosbert Bhd (In Liquidation)* supports the general rule, namely SIC's should be heard inter partes. The *ex parte* hearing of the SIC for leave to file a suit against the wound up appellant company did not cause any substantial injustice to the appellant company as the appellant company had subsequently applied to set aside the *ex parte* leave but had failed to set aside the *ex parte* leave. I do not see how *Mosbert Bhd (In Liquidation)* can be relied on to justify an *ex parte* hearing of the SIC.

No Reliance On Sealed Ex Parte Orders Of High Court

[28] The petitioner has cited a host of sealed *ex parte* orders of High Court on a variety of matters pertaining to winding up (orders).

[29] With respect, I am unable to accept the orders as a basis to justify an *ex parte* hearing of the SIC. A sealed order is not a *ratio decidendi* which forms a binding precedent. Suffice for me to quote the judgment of Raja Azlan Shah FJ (as His Royal Highness then was) in the Federal Court case of *Malaysia National Insurance Sdn Bhd v. Abdul Aziz bin Mohamed Daud* [1979] 1 LNS 117; [1979] 2 MLJ 29, at p. 32:

> However, I would once again emphasise what has so often been said before, that **precedents are not to be slavishly followed; a case may be followed only for its strict *ratio decidendi*.** (emphasis added)

Effect Of s. 227 CA

[30] Section 227 CA provides as follows:

> 227. *The following provisions with respect to liquidators shall have effect on a winding up order being made:*
>
> *(1) if an approved liquidator other than the [OR] is not appointed to be the liquidator of the company the [OR] shall by virtue of his office become the [PL] and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such;*
>
> *(2) if there is no liquidator appointed the [OR] shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the [OR];*
>
> *(3) the Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matter aforesaid, the Court shall decide the difference and make such order thereon as the Court may think fit*;
>
> (4) in a case where a liquidator is not appointed by the Court, the [OR] shall be the liquidator of the company;
>
> (5) the [OR] shall by virtue of his office be the liquidator during any vacancy;
>
> (6) any vacancy in the office of a liquidator appointed by the Court may be filled by the Court; … (emphasis added)

[31] Mr Alex Chang submitted as follows:

(a) upon the pronouncement of the winding up order, s. 227(1) mandatorily requires the winding up court to appoint the OR as PL;

(b) after the OR's appointment as PL, s. 227(2) CA provides that the OR shall summon separate meetings of the creditors and contributories of the respondent company for the purpose of determining whether or not an application is to be made to the winding up court to appoint the liquidator in place of the OR;

(c) if there is a difference between the decisions of the meetings of the respondent company's creditors and contributories as to who shall be appointed as the liquidator, the winding up court shall decide the difference; and

(d) the following two unreported judgments of the High Court have been cited in support of the petitioner's above stand:

(i) *Bidari Ehsan Sdn Bhd (In Iiquidation) v. Inai Tropika Sdn Bhd* [2012] 1 LNS 842; and

(ii) *Lim Yong Chiang v. Suria 2000 Sdn Bhd* [2014] 1 LNS 884.

[32] Firstly, *Bidari Ehsan Sdn Bhd (In Iiquidation)* and *Lim Yong Chiang* did not discuss s. 227 CA, especially the issue which arose in this petition. Both these cases appointed the OR as the PL without any discussion of s. 227 CA. Accordingly, both these cases have not decided the effect of s. 227 CA, let alone the mandatory effect of s. 227(1) CA. In any event, the High Court is not bound by a previous High Court's judgment – the Federal Court's judgment in *Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173; [1967] 2 MLJ 211, at p. 213.

[33] Secondly, I am unable to find any Malaysian case which has decided s. 227 CA. Nor can I find any judgment from Singapore, Australia, New Zealand and England regarding a provision in their companies legislation which is similar to our s. 227 CA.

Section 227(1) CA Is Not Mandatory

[34] The word "shall" in s. 227(1) CA does not necessarily mean that such a provision is mandatory. According to the Federal Court case of *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332; [1997] 2 MLJ 271, at p. 359 (CLJ); p. 295 (MLJ):

> … the use of word 'shall', in s. 15(5) (of the Legal Profession Act 1976) is taken *prima facie* to import some sort of obligation in contradiction to the word 'may'.

[35] In *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360, at p. 362, the Supreme Court held that the word "shall" in s. 158(2) of the Criminal Procedure Code ('CPC') is only directory for the following reasons:

> *The question that arises is whether section 158(ii) (CPC) is mandatory or directory. In our view, the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature*

A *in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (*see *Interpretation of Statutes* by Bindra, 7th Ed., p. 662)*. We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory* (see *Howard v. Bodington*
B [1877] 2 PD 203 at p 211).

Applying the test to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of section 158(ii) (CPC) is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode
C of trial. A *fortiori* in the light of the provision of section 422 (CPC). The nature of the amendment being purely technical and in no way substantial has not rendered the omission to read over and explain the amended charge to the applicant at the close of the defence a serious irregularity as to vitiate the proceeding or has occasioned a failure of justice. (emphasis added)

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[36] I am of the considered view that s. 227(1) CA is not mandatory for the following reasons:

(a) the subject matter of s. 227 CA concerns the appointment of liquidators and not so much the appointment of PL's. The appointment of a PL has
E been expressly provided for in s. 231 CA and r. 35(1) WUR. If there is a need to appoint a PL, a petitioner may apply under s. 231 CA and r. 35(1) WUR. Hence, there is no need for any mandatory effect for the OR to be appointed as PL under s. 227(1) CA;

(b) even if the winding up court has appointed the OR as the liquidator, the
F following parties may still apply to substitute the OR with a private liquidator under s. 232(1) CA:

(i) the petitioner; and/or

(ii) any creditor and/or contributory of the respondent company; and

G (c) there is no prejudice to the petitioner, creditors and contributories of the respondent by the immediate appointment of the OR as the liquidator instead of appointing the OR as the PL.

Purposive Interpretation Of s. 227(1) CA

H **[37]** As elaborated above, since CA has been revised under RLA, Part 1 IA applies to CA according to s. 2(1)(b) IA. Section 17A IA provides as follows:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated
I *in the Act or not) shall be preferred to a construction that would not promote that purpose or object*. (emphasis added)

[38] In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2004] 2 CLJ 265; [2005] 3 MLJ 97, at pp. 105-106, 108-109 and 130, the Federal Court applied s. 17A IA to give a purposive interpretation of the Palm Oil Research and Development Act 1979.

[39] I am of the opinion that s. 227(1) CA should be given a purposive interpretation as follows:

(a) as held by the Supreme Court in *Mosbert Bhd (In Liquidation)*, at p. 447:

(i) the primary object of winding up is the collection and distribution of the respondent company's assets *pari passu* among the respondent company's unsecured creditors; and

(ii) all claims against the wound up company shall be resolved by the cheap and summary procedure in winding up and not be way of expensive litigation

(Statutory Purpose of Winding Up); and

(b) an interpretation that s. 227(1) is not mandatory but merely directory, is in accordance with the Statutory Purpose of Winding Up to ensure that winding up process is completed speedily and in a less costly manner. If s. 227(1) CA is construed in a mandatory manner, as contended by the petitioner in this case, the winding up will be unnecessarily prolonged and made more costly as follows:

(i) the OR has to be first appointed as PL;

(ii) two separate meetings of the respondent company's creditors and contributories have to be held to decide whether or not an application is to be made to the winding up court to appoint a private liquidator as the liquidator in place of the OR; and

(iii) if there is a difference between the decisions of the meetings of the respondent company's creditors and contributories as to who shall be appointed as the liquidator, an application has to be made to the winding up court to enable the court to resolve such a difference.

It is to be noted that any increase in the winding up costs will correspondingly reduce the amount of dividends payable to the respondent company's creditors under r. 101(1) WUR.

[40] The above purposive interpretation of s. 227(1) CA is supported by a policy consideration that the OR has very limited resources and the petitioner's construction of s. 227(1) CA will unnecessarily increase the OR's already heavy workload.

A *Application Of s. 221(2)(b) CA And r. 194(1) WUR In This Case*

[41] In the event that I have erred in interpreting s. 227(1) CA, namely assuming that s. 227(1) CA has mandatory legal effect, I am of the view that non-compliance with s. 227(1) CA is curable under s. 221(2)(b) CA and/or r. 194(1) WUR. My opinion is premised on the following reasons:

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(a) no substantial injustice has been caused to the petitioner, respondent, any creditor and/or contributory of the respondent by appointing immediately the OR as the liquidator; and

(b) as explained above, under s. 232(1) CA, the petitioner, any creditor C and/or contributory of the respondent may apply to the winding up court to replace the OR with any private liquidator as the petitioner, creditor or contributory of the respondent sees fit.

[42] In *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189; [1990] 2 MLJ 46, at p. 47, the High Court has D held that "the court has wide discretion under s. 221(2)(b) (CA) to waive irregularities".

[43] The following cases have applied r. 194(1) WUR to cure "any formal defect or any irregularity":

E (a) the Court of Appeal's judgment in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at p. 265; and

(b) the Court of Appeal case of *GKM Amal Sdn Bhd v. Bank Utama (Malaysia) Bhd* [2004] 1 CLJ 769, at pp. 772.

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Epilogue

[44] I must express my gratitude to Mr Alex Chang for his detailed submission in the discharge of his duties to the court and his client.

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